No. 84-974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK R. BATTIPAGLIA

-and-

BACCHUS SELECTIONS, INC.,

Petitioners,

vs.

NEW YORK STATE LIQUOR AUTHORITY,

Respondent,

-and-

PEERLESS IMPORTERS, INC.,

Respondent-Intervenor.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT-INTERVENOR PEERLESS IMPORTERS, INC. IN OPPOSITION TO PETITION

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BRIEF OF RESPONDENT-INTERVENOR PEERLESS IMPORTERS, INC. IN OPPOSITION TO PETITION

PRELIMINARY STATEMENT

Respondent-intervenor Peerless Importers, Inc. ("Peerless")[1] submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[1] Peerless is the corporate parent of Johnny Barton, Inc. and 181 Lawrence Avenue Realty Corporation. Johnny Barton, Inc. is the parent of All American Distributing Co., Inc.

There are no special or important reasons that warrant review of the decision below.[2] Judge Friendly's opinion for the court below is fully in accord with this Court's decision in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), and does not conflict with *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). This Court's recent decision in *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984), moreover, eliminates any remaining doubt as to the legality of the challenged statute, Section 101-b(3)(b) of New York's Alcoholic Beverage Control Law.

The issues raised by the petitioners' claims are not the subject of any conflict among the circuits, between any federal court and the courts of New York, or among state courts of last resort. The New York Court of Appeals has rejected a virtually identical antitrust challenge to Section 101-b(3)(b). *Admiral Wine & Liquor Co. v. State Liquor Authority*, 61 N.Y.2d 858, 473 N.Y.S.2d 969, 462 N.E.2d 146 (1984).[3] Of the state courts which have decided the issue, all but one, and all courts of last resort, have held that alcoholic beverage price-posting statutes such as Section 101-b(3)(b) do not conflict with the federal antitrust laws. No federal court of appeals other than the court below has yet decided the issues presented here.

It may be noted that this Court has on two recent occasions declined to review state court decisions involving questions virtually identical to those raised by the petitioners. *See Wine & Spirits Specialty, Inc. v. Daniel*, 105 S. Ct. 56 (1984), *dismissing appeal from* 666 S.W.2d 416 (Mo.); *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 104 S. Ct. 193 (1983), *denying cert. to* 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 (1982).

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[2] The petition's use of the words "on behalf of themselves and all others similarly situated" is potentially misleading. Petition ("Pet.") at 1. This is not a class action and the petitioners have never sought certification for any plaintiff class.

[3] The petitioners have failed to mention *Admiral* in their papers. Such omission is inexplicable, particularly in light of petitioner Battipaglia's participation in *Admiral* as *amicus curiae*.

COUNTERSTATEMENT OF THE ISSUES

Section 101-b(3)(b) seeks to prevent discrimination by wholesalers in sales of liquor or wine to retailers and requires each wholesaler to file or post monthly price schedules with the State Liquor Authority.[4] Each wholesaler is free to set its own prices and is merely required to adhere to its scheduled prices until it publishes a new schedule the following month. Other subdivisions of Section 101-b permit a wholesaler to offer limited quantity discounts and to amend its posted prices downward to meet competition.

The petitioners' challenge to Section 101-b(3)(b) thus raises the following issues:

1. Does the price-posting requirement on its face irreconcilably conflict with Section One of the Sherman Act, 15 U.S.C. § 1?

2. Assuming the existence of such a conflict, is Section 101-b(3)(b) immune from antitrust challenge by virtue of either (a) the state action doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), or (b) the Twenty-first Amendment to the United States Constitution?

STATEMENT OF THE CASE

The facts of this case, the identity of the parties and the proceedings below are described in the Court of Appeals' opinion[5] and, in the interests of brevity, will not be fully repeated herein. Peerless would, however, point out the following:

1. Section 101-b(3)(b) does not mandate any agreement among wholesalers or between any wholesaler and any retailer

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[4] The text of Section 101-b(3)(b) and Section One of the Sherman Act, 15 U.S.C. § 1, are contained in the Petition and in the interests of brevity will not be reproduced herein.

[5] *Battipaglia v. New York State Liquor Authority,* 745 F.2d 166 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3509 (U.S. Dec. 13, 1984) (84-974). The September 27, 1982 opinion of the district court denying the petitioners' motion for summary judgment is reported at 1982-2 Trade Cas. (CCH) ¶ 64, 964 (S.D.N.Y. 1982).

and does not require a wholesaler to adopt the prices of any other wholesaler. Each wholesaler is free to set its own prices and is merely required to adhere to its scheduled prices until it publishes a new schedule the following month.

2. The purpose of Section 101-b(3)(b) is to prevent wholesalers from discriminating among individual retailers. The petitioners have in fact strongly indicated that the purpose of their challenge is to permit a large retailer, such as petitioner Battipaglia, to obtain quantity discounts on a scale not available to smaller retailers. *See* Pet. at 8, 9-10.

3. The petitioners challenge Section 101-b(3)(b) on its face and without the benefit of any finding as to the statute's actual effect on competition. As Judge Friendly recognized, the record below does not state the actual impact of Section 101-b(3)(b) on competition or market behavior. 745 F.2d at 173 n.10, 175; *see also id.* at 178-179. The record below also does not indicate the conditions or structure of the market allegedly affected by Section 101-b(3)(b).

4. There is therefore no record to support the petition's assertions as to the economic effect of the challenged statute. *See* Pet. at 5, 9, 11-12.[6]

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT PRESENT ANY UNSETTLED QUESTION OF FEDERAL LAW OR ANY CONFLICT REQUIRING RESOLUTION BY THIS COURT

A. This Court's decision in *Norman Williams,* 458 U.S. 654, largely resolves the question of Section 101-b(3)(b)'s validity. As both the court below and the New York Court of

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[6] Peerless, moreover, disputed the petitioners' contentions of anticompetitive impact in the district court. *See* October 20, 1981 Affidavit of Marvin Hauben in Support of Intervention and in Opposition to Plaintiffs' Motion for Summary Judgment at ¶¶ 35-40, 80 Civ. 5701 (S.D.N.Y.).

Appeals in *Admiral* recognized, Section 101-b(3)(b) does not command conduct that is *per se* illegal under the antitrust laws. Under *Norman Williams,* Section 101-b(3)(b) is therefore at least facially valid.

In *Norman Williams,* this Court followed its earlier decisions[7] and reiterated the circumstances under which the Sherman Act will preempt a state law. As Justice Rehnquist's opinion explained:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

458 U.S. at 661. A state law thus conflicts with the Sherman Act only if it in all cases compels private conduct that is a *per se* violation of the Sherman Act.

Section 101-b(3)(b) does not mandate conduct that is *per se* illegal in all cases and is therefore valid under *Norman Williams.* The statute only requires unilateral acts on the part of each wholesaler and does not require any price uniformity or any understanding as to prices among wholesalers. As the court below noted, a substantial question exists as to whether the statute requires the agreement necessary for a Sherman Act violation. 745 F.2d at 170, 172-73; *see also Admiral,* 61 N.Y.2d at 860-61, 473 N.Y.S.2d at 970, 462 N.E. 2d at 147.[8] Certainly,

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[7] *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 110-11 (1978); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 129-34 (1978); *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45-46 (1966).

[8] It may be noted that the petitioners do not contend that Section 101-b(3)(b) actually compels any wholesaler to enter into any agreement violative of the Sherman Act. As Judge Friendly recognized, "[i]ndeed the complaint does not allege any agreement among the wholesalers; it complains only of the acts of the Authority." 745 F.2d at 170.

the exchange of price information, standing alone, does not invariably lead to participation in a price-fixing scheme and is not *per se* illegal. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); *see also Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925). Each New York wholesaler can fulfill all of its obligations under the statute without conspiring to fix prices or even engaging in consciously parallel pricing.

No conflict exists between the decision below and this Court's decision in *Midcal*. The statute at issue in *Midcal* required resale price maintenance in that wine suppliers were empowered to determine the resale prices for their products. 445 U.S. at 99. As New York's highest court held in *Admiral*, however, Section 101-b(3)(b) "does not authorize anyone to determine retail prices for wine, nor does it bind other wholesalers as to the prices which they may charge their dealers." 61 N.Y.2d at 860-861, 473 N.Y.S.2d at 970, 462 N.E.2d at 147 (distinguishing *Midcal* and *William J. Mezzetti Associates, Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 432 N.Y.S.2d 372, 411 N.E.2d 791 (1980)). The statute at issue herein is not, as the petitioners claim, "similar" to the statute invalidated in *Midcal*. Pet. at 4. Unlike the *Midcal* statute, Section 101-b(3)(b) does not authorize or condone resale price maintenance.

B. The decision below is in accord with the New York Court of Appeals' decision in *Admiral* as to Section 101-b(3)(b)'s validity. The *Admiral* court held that Section 101-b(3)(b) is valid under *Norman Williams* because it does not mandate the concerted action required for a finding of illegality under Section One of the Sherman Act. 61 N.Y.2d at 861, 473 N.Y.S.2d at 970, 462 N.E.2d at 147.

In upholding Section 101-b(3)(b), New York's highest court rejected the very arguments made by the petitioners in the proceedings below. Battipaglia appeared in *Admiral* as an *amicus curiae* and was represented by the attorneys who represent both the petitioners here. *See* 61 N.Y.2d 858, 473

N.Y.S.2d 969, 462 N.E.2d 146; November 18, 1983 Affirmation of Martin P. Mehler, Esq. at ¶¶ 5-6, 80 Civ. 5701 (S.D.N.Y.).[9]

C. The petition does not, and could not, allege that the decision below conflicts with that of any other federal court of appeals or any state court of last resort.

No federal court of appeals other than the court below has yet decided whether alcoholic beverage statutes that require the posting of prices violate the Sherman Act. The two reported federal district court decisions that involved similar challenges to alcoholic beverage price-posting statutes and regulations have upheld such laws. *See Miller v. Hedlund,* 579 F. Supp. 116 (D. Or. 1984), *appeal docketed,* No. 84-3749 (9th Cir. April 12, 1984);[10] *Enrico's, Inc. v. Rice,* 551 F. Supp. 511

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[9] *Admiral* indicates that the highest court of New York regards Section 101-b(3)(b) as serving important state interests. The California Supreme Court, on the other hand, had, prior to *Midcal,* held that alcoholic beverage resale price maintenance statutes served no state interest that would overcome federal antitrust policy. *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978). The California Alcoholic Beverage Control Department was consequently reluctant to defend the statute at issue in *Midcal* and did not take the appeal to this Court. 455 U.S. at 101-02.

Thus, as Judge Friendly noted, "§ 2 of the Twenty-First Amendment dictates deference to the state" in this case since "in contrast to *Midcal,* those charged with administering the statute and the highest court of New York have identified [Section 101-b(3)(b)] as embodying an important state policy." 745 F.2d at 179. *See also* 9 n. 12, *infra.*

[10] Argument has not yet been scheduled in *Miller.*

An earlier Ninth Circuit decision involving milk pricing statutes and regulations, *Knudsen v. Nevada State Dairy Commission,* 676 F.2d 374 (9th Cir. 1982), is not authoritative on the question of an alcoholic beverage statute's validity. That case, moreover, only involved appellate review of a district court's exercise of discretion in temporarily enjoining regulatory enforcement and was not a *de novo* consideration of legal issues.

Knudsen was, in addition, decided prior to this Court's decision in *Norman Williams.* It therefore did not consider that decision's ruling as to the circumstances in which state statutes can be preempted on antitrust grounds. *See Miller,* 579 F. Supp. at 120 n.2.

(N.D. Cal. 1982), *vacated as moot,* 730 F.2d 1250 (9th Cir. 1984). The decision below accordingly does not conflict with that of any other federal court, much less a court of appeals.

The Second Circuit's rejection of the petitioners' claims, moreover, is in accord with the holdings of all state courts of last resort which have faced similar issues. In addition to the New York Court of Appeals, the Supreme Courts of Minnesota and Missouri have applied *Norman Williams* to reject antitrust challenges to alcoholic beverage price-posting laws similar to Section 101-b(3)(b). *Intercontinental Packaging Co. v. Novak,* 348 N.W.2d 330 (Minn. 1984); *Wine & Spirits Specialty, Inc. v. Daniel,* 666 S.W.2d 416 (Mo.), *appeal dismissed,* 105 S. Ct. 56 (1984).

The only state decision known to Peerless that has invalidated a price-posting statute on federal antitrust grounds is not by a court of last resort. That decision, *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board,* 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 (1982), *cert. denied,* 104 S. Ct. 193 (1983), is of questionable authority: its consideration of *Norman Williams* was cursory and limited to a footnote. 136 Cal. App. 3d at 834 n.6, 186 Cal. Rptr. at 556 n.6.[11]

D. The absence of any unsettled issue of federal law deserving of review is finally shown by this Court's refusal this term to review *Wine & Spirits,* 105 S. Ct. 56, a case involving issues identical to those presented in this appeal.

As previously noted, *Wine & Spirits* involved an antitrust challenge to Missouri laws that, like Section 101-b(3)(b), required alcoholic beverage wholesalers to file binding monthly price schedules with the state alcoholic beverage control agency. *See* 666 S.W.2d 416. The Supreme Court of Missouri upheld the Missouri laws and Wine & Spirits subsequently

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[11] Peerless knows of one state court decision, *Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission,* 217 Neb. 487, 351 N.W.2d 701 (1984), which invalidated a price-posting law on state constitutional grounds. *Finocchiaro* does not conflict with the decision below since it did not decide any questions of federal antitrust law.

sought review in this Court. In an order dated October 1, 1984, this Court dismissed the appeal from the Missouri Supreme Court for lack of a substantial federal question. 105 S. Ct. 56.

Wine & Spirits is indistinguishable from this case and indicates that the petition does not present any substantial federal question. This conclusion is further reinforced by this Court's denial of certiorari in *Lewis-Westco,* which, as previously noted, also involved an antitrust challenge to an alcoholic beverage price-posting statute. 104 S. Ct. 193.

II.

THE DECISION BELOW IS CORRECT

A. The court below rested its decision on the proposition that "clearly, the New York law does not place 'irresistible pressure on a private party to violate the antitrust laws in order to comply' with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month." 745 F.2d at 175 (quoting *Norman Williams,* 458 U.S. at 661). As previously noted, the conclusion that the Sherman Act does not preempt New York's law therefore necessarily follows under *Norman Williams.*[12]

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[12] The court below also emphasized that the Twenty-first Amendment mandates deference to Section 101-b(3)(b), particularly in light of the New York Court of Appeals' approval of the statute in *Admiral.* 745 F.2d at 177-79.

The extent of immunity of a state alcoholic beverage law under the Twenty-first Amendment must be resolved "only after careful scrutiny of [the competing concerns] in a 'concrete case' ". *Midcal,* 445 U.S. at 110 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 332 (1964)); *cf. New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718 (1981) (New York's powers under the Twenty-first Amendment overcome interests which are at least arguably protected by the First Amendment).

As the court below recognized, New York's interest in Section 101-b(3)(b) is greater than that of California in the *Midcal* statute and outweighs any federal interest in invalidating the New York price-posting statute on antitrust grounds. 745 F.2d at 777-79.

B. In upholding Section 101-b(3)(b) on the basis of *Norman Williams,* the court below found it unnecessary to decide whether the "state action" doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), dictated the same result. It should nonetheless be noted that this Court's recent decision in *Hoover,* 104 S. Ct. 1989, resolves any question as to the applicability of *Parker* and the status of Section 101-b(3)(b) as exempt state action.

In *Hoover* this Court clarified its earlier decision in *Midcal* and held that the latter's two-prong test for state action does not apply where the challenged anticompetitive activity is unquestionably that of the state itself. Justice Powell's opinion stated that the clear articulation and active supervision criteria of *Midcal* were required only to determine the state action immunity of acts by non-sovereign parties purporting to represent the state. These requirements, however, are of little use as indicia of state action where the state imposes restraints directly. This Court stated:

> When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision." *Hoover,* 104 S. Ct. at 1995-96.

Hoover necessarily means that the two-prong test in *Midcal* is inapplicable and that Section 101-b(3)(b) is *ipso facto* exempt under *Parker. See Hoover,* 104 S. Ct. at 1995 ("when a state legislature adopts legislation, its actions constitute those of the state . . . and *ipso facto* are exempt from the operation of the antitrust laws"). Any restraint of trade that Section 101-b(3)(b) imposes comes from New York, not private persons. Section 101-b(3)(b)'s price-posting requirements were "never intended to operate by force of individual agreement or combination" but instead result from a decision by the New York legislature to regulate trade and are administered by the state

through the New York State Liquor Authority. *See Parker*, 317 U.S. at 350.

To the extent that *Parker* embraces the notion that antitrust immunity depends upon compatibility between state and federal policy, such condition is satisfied herein.[13] Section 101-b(3)(b) not only commands no private violation but has as its affirmative objective the prevention of price discrimination, the very policy implemented at the federal level by the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a. Section 101-b(3)(b) is part of a general section aimed at combating discriminatory practices[14] and its requirement for publication and adherence to posted prices is, as Judge Friendly noted, "an effective way, perhaps the only really effective way" of preventing price discrmination. 745 F.2d at 178. Other provisions, moreover, like the federal statute, permit meeting competition in good faith and, within limitations, granting justifiable quantity discounts. *See* Sections 101-b(4) and 101-b(2).

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[13] The *Parker* Court also held that the California regulation there in question did not contradict federal agricultural policy. 317 U.S. at 354-55.

[14] Section 101-b contains a number of antidiscriminatory provisions, of which Section 101-b(3)(b) is one. It may be noted that this Court rejected antitrust and Commerce Clause challenges to another provision of Section 101-b in *Joseph E. Seagram & Sons*, 384 U.S. 35.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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